Editor's note: 80 I.D. 702

JAMES E. SMITH

IBLA 73-368 Decided October 31, 1973

Appeal from decision of the Eastern States Office, Bureau of Land Management, rejecting color of title application ES 9782 (Wisconsin).

Affirmed.

Color or Claim of Title: Generally

A color of title application cannot be allowed where the applicant fails to show that the land applied for is public land, i.e., land subject to the operation of the public land laws.

13 IBLA 306

Color or Claim of Title: Generally ! ! Words and Phrases

The term "public land," as used in the Color of Title Act, 43 U.S.C. § 1068 (1970), does not include land purchased by the Government. That term does not include land which has been set aside by Executive Order for the benefit of the Indians.

Color or Claim of Title: Applications

A color of title application embracing land occupied by one purportedly claiming under color of title, but who does not establish that the land in issue was conveyed to him by an instrument which, on its face, purported to convey the land in issue, is not allowable, since color or claim of title is not demonstrated.

APPEARANCES: Harold Witkin, Esq., Davis, Witkin, Foley & Weiby, Superior, Wisconsin, for appellant.

OPINION BY MR. FISHMAN

James E. Smith has appealed from a decision, ES 9782 (Wisconsin), rendered on March 20, 1973, by the Eastern States Office, Bureau of Land Management, which rejected his color of title application. The application embraced Lot 1, sec. 4, T. 38 N., R. 8 W., 4th P.M., Sawyer County, Wisconsin, containing approximately 47.77 acres. The decision recited in part as follows:

> An examination of the record shows that the land described above is not public land and is, therefore, not subject to the provisions of the Color of Title Act.
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> On November 13, 1885, Mary Bray was issued a restricted fee patent to the subject land. On March 5, 1919, a certificate of competency was issued to Mary Bray (now Perron) providing, among other things, that she had 'full power and authority to sell and convey any or all lands above described.' The lands described included the lands subject to this decision.
>
> A subsequent chain of title shows that this land was ultimately conveyed by warranty deed dated January 1, 1938, from Sawyer County, Wisconsin, to the Bureau of Indian Affairs. The land is still under the jurisdiction of that agency or a part of the Lac Court Orielles Indian Reservation.
>
> Therefore, the land is not under the jurisdiction of the Bureau of Land Management and the subject application is hereby rejected.

Appellant on appeal asserts that he has been the sole occupant of this property since 1930, and has worked and cultivated at least 17 1/2 acres since that time without objection or questions ever being raised.

Executive Order 7868 of April 15, 1938, affecting the land in issue, stated in pertinent part as follows:

> * * * [J]urisdiction over the lands * * * together with the improvements thereon * * * is hereby, transferred from the Secretary of Agriculture to the Secretary of the Interior * * * and the Secretary of the Interior is hereby authorized (1) to administer, through the Commissioner of Indian Affairs, such lands for the uses for which they were, or are in the process of being, acquired, and, insofar as consistent with such uses, for the benefit of such Indians as he may designate * * *.

The threshold question presented by the case is whether the lands in issue constitute public lands of the United States subject to disposition within the purview of the Color of Title Act, as amended, 43 U.S.C. §§ 1068, 1068a, 1068b (1970). We stated in Donald E. Miller, 2 IBLA 309, 312 (1971), as follows:

> The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used.

> Although it is true that often those words mean such land as is subject to sale or disposition under the general public land laws, and not such as is reserved for any purpose, the term has been applied to reserved lands title to which was in the United States and to which no other party had acquired a vested right. * * * (Footnotes omitted.)

Lands acquired by the United States from a county through purchase or other transfer are not public lands. See Bobby Lee Moore, 72 I.D. 505, 508 (1965). 1/

1/ In Moore, supra at 508-509, the Department stated:

"The distinction between 'public lands' and 'acquired lands' has been the subject of many decisions of the courts and of this Department, and recognition of the difference between them should not at this time present a serious problem. 'Public land is Government ! owned land which was part of the original public domain.' Barash v. Seaton, 256 F.2d 714, 715 (D.C. Cir. 1958); Thompson v. United States, 308 F.2d 628, 631 (9th Cir. 1962). 'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. "'The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' Newhall v. Sanger, 92 U.S. 761, 763." Barker v. Harvey, 181 U.S. 481, 490 (1901). See Hynes v. Grimes Packing Co., 337 U.S. 86, 114 (1949); Justheim v. McKay, 229 F.2d 29, 30 (D.C. Cir. 1956); United States v. Holliday, 24 F. Supp. 112, 114 (D. Mont. 1938); McKenna v. Wallis, 200 F. Supp. 468 (E.D. La. 1961). "'Acquired land,' as the term implies, is land obtained by the United States through purchase or transfer from a state or a private individual and normally dedicated to a specific use." McKenna v. Wallis, supra; see Barash v. Seaton, supra; Thompson v. United States, supra; United States v. Holliday, supra.

"The essential difference between public land and acquired land, then, is not one of use but, rather, one of origin of title in the United States. Land, the title to which was vested in the United States at the time the land became a part of the United States, is commonly known as 'original public domain.' Such land is subject to use, sale, entry, or other disposition under the

It seems clear, therefore, that lands in which the Indians have a beneficial interest, and were acquired therefor, are not public lands of the United States, particularly where such lands

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fn. 1 (Cont.)
general public land laws of the United States unless withdrawn or reserved for public purpose. When title to any such land leaves the United States through operation of one of the applicable laws, the land ceases to be public domain. It does not follow, however, that upon the revesting of title in the United States to land which once formed part of the public domain the land again becomes public domain. On the contrary,

'It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses * * *. Rawson v. United States, 225 F.2d 855, 858 (9th Cir. 1955).'

"That the public land laws do not apply to acquired lands is well established by an abundance of administrative and judicial decisions. Thus, it has been held that: lands acquired by the United States by purchase under the act of April 8, 1935, 49 Stat. 115, for the purposes of restoration of the range, prevention of erosion, and flood control were not to revert to the public domain and were not subject to grazing use under the public land laws (United States v. Holliday, supra); lands purchased by the Government with funds appropriated under the act of April 8, 1935, supra, designated for administration by the Secretary of Agriculture under the Bankhead ! Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525, as amended, 7 U.S.C. §§ 1000 et seq. (1964), were not open to location under the general mining laws of the United States (Rawson v. United States, supra); lands purchased by the United States under the acts of June 7, 1924, 43 Stat. 654, 16 U.S.C. § 569 (1964), and March 3, 1925, 43 Stat. 1133, 16 U.S.C. § 555 (1964), to be administered by the Secretary of Agriculture as national forest lands, were not subject to entry and location under the general mining laws of the United States (Thompson v. United States, supra); lands acquired by the United States for military purposes were not 'public lands' within the meaning of the Gerard Script Act of February 10, 1855, 10 Stat. 849, and were not subject to selection under the act (El Mirador Hotel Co., supra). [60 I.D. 299 (1949)]."

have been reserved in connection with an Indian program as was done by Executive Order 7868 of April 15, 1938. United States v. Schwarz, 460 F.2d 1365, 1371-2 (7th Cir. 1972).

Moreover, our examination of the record reveals another fatal defect. In his application for the land, in response to the question "Are you applying for the lands as record title owner?", appellant responded as follows:

> I have never received a deed to this land, but have worked it and cultivated it as my own since 1930.

The Board has held that land occupied by one purportedly claiming under color of title, but who does not establish that the land in issue was conveyed to him by an instrument which, on its face, purported to convey the land in issue, is not subject to disposal to that applicant under the Color of Title Act. S. V. Wantrup, 5 IBLA 286 (1972). More specifically, the Board has held that a color of title application must be rejected where there is not shown an instrument, which, on its face, purports to convey the land in issue. Marcus Rudnick, 8 IBLA 65 (1972). As we said in Minnie E. Wharton, 2/ 4 IBLA 287, 294-295, 79 I.D. 6, 9-10 (1972):

2/ Rev'd on other grounds, United States v. Wharton, Civil No. 70-106, D.C. Or., February 26, 1973, amended June 4, 1973, appeal pending.

It is well established that a claim or color of title must be established, if at all, by a deed or other writing which purports to pass title and which appears to be title to the land, but which is not good title. Peterson v. Weber County, 99 Ut. 281, 103 P.2d 652, 655 (1939); * * *.

As was pointed out in Pacific Coast Co. v. James, 5 Alaska 180, aff'd, 234 F. 595 (1916), "[o]ne cannot make his own title."

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fn. 2 (Cont.)
However, in Day v. Hickel, 481 F.2d 473, 476 (9th Cir. 1973), the Court enunciated the principles relied upon in the case at bar, stating:

"As indicated by S. Rep. No. 732, 70th Cong., 1st Sess. (1928), accompanying the bill the purpose of the Act was to authorize the Secretary to deal with 'cases * * * where lands have been held and occupied in good faith for a long period of time under a chain of title found defective * * *.' (Emphasis added.) No mention was made of cases of possession of land where there was no such chain of title. Thus, the history would indicate that there should be excluded from the intent of the Act, land adversely possessed by one who knew that the title was in the United States, but who had no chain of title to it."

* * * * * * *

"There having been no change in the claim or color of title requirements, it is not an unreasonable interpretation by the Secretary that possession of lands by one who knows the title is in the United States does not constitute a claim of title which is sufficient under the Act. The Secretary's decisions have followed that interpretation. Lester J. Hamel, 74 I.D. 125, 129 (1967); Nora Beatrice Kelley Howerton, 71 I.D. 429, 434 (1964). In Howerton, the Secretary stated:

'Further, even though land may have been occupied, improved, and held by someone else in good faith for more than 20 years under color of title, if a person acquiring the land is aware that title is in the United States, it has been held that he is lacking in good faith and has no right to a patent under the Color of Title Act. Anthony S. Enos, 60 I.D. 106 (1948) and 60 I.D. 329 (1949); Clement Vincent Tillion, Jr., A-29277 (April 12, 1963).' 71 I.D. at 434."

> The purpose and intent of the Color of Title Act was to provide a legal method whereby citizens relying in good faith upon title or claim derived from some source other than the federal government, who had continued in peaceful, adverse possession of public land for the prescribed period and had made valuable improvements, or had reduced some part of the land to cultivation, might acquire title thereto. Ralph Findlay, A-23522 (February 23, 1943). However, the statute was not intended to provide a means for obtaining a patent by the mere occupation of public land under a mere pretense of title or claim, or a title or claim which the claimant had knowledge or good reason to believe was not a good title. William Benton, A-23258 (November 14, 1942). See Jacob Dykstra, 2 IBLA 177 (April 22, 1971); Cf. Hugh Manning, A-28383 (August 18, 1960).

Appellant asserts a right to the land based upon his adverse possession. It has been held specifically that the adverse possession statutes of the State of Wisconsin do not apply to Indian lands or to lands held by the United States on behalf of Indians. United States v. Schwarz, supra.

We further stated in Wharton, supra at 10, that:

> * * * An applicant under the Act must show a rationally justifiable reason for believing that he owned the land. See Myrtle A. Freer et al., 70 I.D. 145 (1963).

Appellant has not shown any rational basis for his belief that he owns the land in issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Member

We concur:

Joseph W. Goss
Member

Edward W. Stuebing
Member